# No. 15,950

# United States Court of Appeals

## For the Ninth Circuit

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BIDART BROS., a corporation,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

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**Appeal from the United States District Court for the Southern District of California, Northern Division.**

**Honorable Gilbert H. Jertberg, Judge.**

## APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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## APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:*

Comes now appellant, Bidart Bros., a corporation, and respectfully petitions the above entitled Court for a rehearing and a reconsideration of its opinion in the above matter, rendered January 7, 1959.

The reason for this urgent request is that the entire opinion is based upon an erroneous premise, and the conclusion reached is as erroneous as the premise upon which it is based, namely, that there is a necessity for a new and further definition of "land".

This term is one of the most commonly understood and least confusing words in the English language.

Land is the solid substance of the earth as distinguished from the atmosphere and the liquid portion thereof, to-wit, water. To pose the question "Is a 'leasehold' land?" is to create an artificial absurdity. The answer is obviously "No". A leasehold is one method of tenure by which land is commonly held. Neither is a "fee simple" land. It is another method of tenure by which "land" is held.

The plain language of the statute itself excludes the idea of one form of tenure being preferred to another, in the following language:

> "In the case of an unharvested crop on land used in the trade or business and held for more than six months . . ."

It is the six months holding time that has been adopted by Congress as a breaking point between short and long term capital gains, and it has applied this breaking point to real property and to personal property alike. The opinion in its present form entirely overlooks this basic premise. The opinion suggests that taxation as capital gains is not a matter of right but of grace. True. But the Legislature has extended the grace in the language it has used.

It is suggested that an affirmative statement by Congress is needed to include unharvested crops grown on land held under lease. The answer to this contention is that Congress has, in the language it has used, done exactly that. As noted in the *Corn Products* case cited in the opinion, the recent extensions to Section 117 of the old Act pertaining to capital gains were basically designed to relieve taxpayers who sell

their business of harsh and extreme tax burdens. This basic premise applies with equal force to unharvested crops growing upon land held under tenure and land held under fee title.

Several questions are posed on page 5 of the opinion:

First, did Congress without question intend to permit the sale of unharvested crops growing on any leasehold? The answer is that Congress intended unharvested crops to be accorded capital gains treatment if the land was held more than six months. Congress did not differentiate between the value of the unharvested crops and the value of the right to hold the land, if it was held more than six months.

The horrible example set forth in footnote 6 is not in point. A farmer who owns his land and then leases it and sells the unharvested crop is not disposing of his entire interest in the land, which is the situation where a lessee farmer goes out of the farming business and disposes of it in its entirety.

There is no danger in an owner-lessee subterfuge. Sight should not be lost of the fact that after the sale of the unharvested crop the purchaser will have further operations in connection with the crop, to bring it to maturity, and when the crop is harvested and sold then a transaction under the category of ordinary income will in all cases eventually come to pass.

It may well be that Congress may choose to give further consideration to the language of Section 117

(j) (3) and to be more specific in defining the transactions to which the section applies. In its present form, however, the clear and unequivocal language of the section includes every form of land holding that has been in existence for more than six months.

Finally, the opinion in its present form is in violation of Article I, Section 8, subdivision (1) of the Constitution of the United States, which requires all taxes, duties, imposts and excises shall be uniform throughout the United States. The result of this opinion is a total lack of uniformity in the treatment of unharvested crops, with the result that 60% of farmers growing unharvested crops are denied capital gains treatment on the crops in the case of sales of their farms and crops, while 30% plus are afforded the special privilege of long term capital gain treatment.

The decisions are legion to the effect that it is unconstitutional to discriminate between persons on the basis of race, creed or color.

It is equally unconstitutional to discriminate between persons on the basis of tenure.

For the foregoing reasons a reconsideration of this problem is respectfully urged.

Dated, Bakersfield, California,
January 28, 1959.

CONRON, HEARD & JAMES,
By CALVIN H. CONRON, JR.,
*Attorneys for Appellant and Petitioner.*

## Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Bakersfield, California,
January 28, 1959.

Calvin H. Conron, Jr.,
*Of Counsel for Appellant and Petitioner.*